

ACCESS TO JUSTICE FOR CHILDREN: AUSTRALIA

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I. What is the legal status of the Convention on the Rights of the Child (CRC)?

A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?

The Australian Federal Government¹ ratified the CRC in 1990, which became binding on Australia in January 1991.² The state and territory governments are also bound. The Federal Government has the power under the external affairs provision of the Constitution³ to implement treaty obligations (such as those under the CRC).⁴ This power could be used to ensure that states and territories comply with the CRC's requirements.

However, although the CRC has been ratified, it has not been directly incorporated in Australian law (see part I.C below) and this power has not been used in this manner to date to enforce any provision of the CRC.

B. Does the CRC take precedence over national law?

The CRC does not take precedence over national law. In its 2005 Concluding Observations, the Committee on the Rights of the Child stated its concern that the judiciary could not use the CRC to override inconsistent provisions of domestic law.⁵

C. Has the CRC been incorporated in national law?

Although the CRC has been ratified, it has not been directly incorporated in Australian law by statute. Under Australian law, a treaty only becomes a “direct source of individual rights and obligations” when it is directly incorporated by legislation.⁶

¹ Note: Australia is a federal parliamentary democracy comprising six states (New South Wales (NSW), Victoria, Queensland, South Australia, Tasmania, Western Australia) and several territories (three with autonomous powers – Australian Capital Territory (ACT), Northern Territory, Norfolk Island; the remainder administered directly by the Federal Government). All of the states and territories are self-governing and separate jurisdictions, and have their own systems of courts and parliaments. Laws in each state and territory are influential on each other, but not binding. Laws passed by the Federal Parliament apply to the whole of Australia. As this report is intended to serve as an overview only, where appropriate it focuses only on the legal situation in the two most populous states, NSW and Victoria.

² Comments on this report provided by James McDougall, children's rights expert, Australia, August 2015.

³ Section 51(xxix) of the Australian Constitution.

⁴ *Commonwealth v. Tasmania* (1983) 158 CLR 1, (the Franklin Dam Case).

⁵ UN Committee on the Rights of the Child, *Concluding observations on the combined second and third periodic reports of Australia*, CRC/C/15/Add.268, 20 October 2005, para. 9. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f15%2fAdd.268&Lang=en.

⁶ This is because, under the Australian Constitution, the making and ratification of treaties is a function of

However, there is some domestic legislation that reflects, and mirrors the intent of, certain provisions of the CRC without directly referring to the CRC. For instance, all states have child protection laws which reflect the obligation to protect children from abuse in Article 19 of the CRC, but do not necessarily refer specifically to the CRC.⁷ The provisions of the Family Law Act 1975 (Cth) relating to children also reflect or refer to some of the rights and principles established by the CRC.⁸

The Federal Parliament has also enacted the Australian Human Rights Commission Act⁹ which specifically empowers this Commission to examine federal legislation and the acts and practices of the Federal Government in order to determine their consistency with “human rights”, which is defined to include the rights and freedoms recognised by any relevant international instrument.¹⁰ In 2012 the Commission’s empowering Act was amended to establish the office of the National Children’s Commissioner as an officer of the Australian Human Rights Commission.¹¹

Furthermore, the Human Rights (Parliamentary Scrutiny) Act established a Parliamentary Joint Committee on Human Rights with the power to examine legislation for compatibility with human rights, which includes the CRC.¹²

It should also be noted that Australia maintains its reservation to Article 37(c) of the CRC, stating that “the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia”. The Committee on the Rights of the Child has requested that Australia withdraw this reservation, stating that it is unnecessary.¹³

D. Can the CRC be directly enforced in the courts?

The CRC cannot be directly enforced in the Australian courts. However, the High Court has stated that legislative provisions should be interpreted by courts in a manner that ensures, as far as possible, that they are consistent with the provisions of Australia's international obligations under a treaty,¹⁴ including the CRC. This will only be available to a court where an ambiguity in a statute arises and only in

the Executive branch of Federal Government, whereas the making and alteration of federal laws is a function of the Federal Parliament. See *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J; Commonwealth of Australia Constitution Act 1901 (Cth) (“Constitution”).

⁷ For a comprehensive breakdown of the primary legislation concerning child protection in each of the states and territories, see Australian Institute of Family Studies, ‘Australian child protection legislation’, <http://www.aifs.gov.au/nch/pubs/sheets/rs14/rs14.html>, 2009, (accessed 28 January 2014).

⁸ Australian Human Rights Commission, ‘Australia’s human rights obligations’, <http://www.humanrights.gov.au/publications/4-australias-human-rights-obligations>, 2004, (accessed 28 January 2014).

⁹ Australian Human Rights Commission Act 1986 (Cth).

¹⁰ *Ibid* s. 3.

¹¹ PART IIAA--NATIONAL CHILDREN'S COMMISSIONER (sections 46MA to 46MN).

¹² Human Rights (Parliamentary Scrutiny) Act 2011 (Cth).

¹³ UN Committee on the Rights of the Child, *Concluding observations on the fourth periodic report of Australia*, CRC/C/AUS/CO/4, 28 August 2012, para.9. Available at: http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf.

¹⁴ *Teoh* at 287.

accordance with the principles of statutory construction.¹⁵

The High Court stated in the same case that ratification of a treaty raises a legitimate expectation that an executive decision-maker will act consistently with its terms.¹⁶ Therefore, the provisions of the CRC could be an indirect source of rights.¹⁷ However academic reflection on this and subsequent High Court commentary suggest that the legitimate expectation principle may no longer be good law.¹⁸

E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

The CRC has been cited in several notable court decisions in Australia, including with respect to the detention of non-citizen children,¹⁹ parental deportation,²⁰ and prosecution in Australia for sexual exploitation of children in other countries.²¹

II. What is the legal status of the child?

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?

Children through their representatives can bring cases in domestic courts to challenge violations of children's rights where there is a cause of action established under existing Australian law, including civil claims, cases to review administrative decisions and actions (see part III.A below), and applications for a writ of habeas corpus to challenge unlawful detention. In the Australian Capital Territory²² and the state of Victoria²³, specific legislation exists which sets out a list of human rights which will be recognised in the courts. Elsewhere, challenges to a violation of a child's rights will be possible to the extent that the right is protected by legislation or common law.

Private criminal prosecutions are allowed in some cases, but these are rare. For example, in NSW, a private citizen can apply to a registrar at a courthouse for a court attendance notice to be issued.²⁴ Grounds must be shown to the registrar before the notice will be issued.²⁵ The right of private citizens to personally conduct a criminal prosecution is restricted to summary cases in the Local Court.²⁶

Individuals can make complaints about the administrative actions and decisions of most Australian Government agencies and government contractors to the Commonwealth Ombudsman, which has wide powers to investigate complaints to consider if they are wrong, unlawful or discriminatory. The Ombudsman has the power to issue recommendations to departments, specific reports to government, or

¹⁵ Comments provided by the National Children's and Youth Law Centre, Australia, August 2015.

¹⁶ *Teoh* at 291.

¹⁷ Australian Human Rights Commission, 'Australia's human rights obligations'.

¹⁸ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1424716.

¹⁹ *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20; 219 CLR 365.

²⁰ *Teoh*.

²¹ *XYZ v Commonwealth of Australia* [2006] HCA 25; (2006) 227 ALR 495.

²² Human Rights Act 2004 (ACT).

²³ Charter of Human Rights and Responsibilities Act 2006 (VIC).

²⁴ Criminal Procedure Act 1986 (NSW), s. 173.

²⁵ *Ibid.*, s. 174.

²⁶ *George Maxwell Ltd* [1980] 2 All ER 99.

broader reports making recommendations to government about systemic problems.²⁷ The Ombudsman cannot override the decisions of agencies, or compel them to comply with recommendations.²⁸

Complaints can also be brought to the state or territory Ombudsmen about the actions or decisions of state or territory governments. There are some differences across the states regarding which bodies the Ombudsman is empowered to investigate. For instance, in Victoria the Ombudsman is not able to investigate complaints about the police, whereas in NSW this is possible.²⁹

Individuals can also make complaints to the Australian Human Rights Commission about the treatment of children in relation to discrimination and breaches of their human rights. The Commission aims to investigate and resolve breaches of human rights through non-adversarial means such as mediation or conciliation, and can recommend the amount and type of compensation for a victim of a human rights violation where appropriate.³⁰

Children's Commissioners and/or Guardians exist in all Australian states and territories, as well as at the national level, with the primary role of advocating for children's rights and examining and reviewing laws, policy and practices that affect children. Although the Australian Human Rights Commission is able to receive complaints from or about children, the National Children's Commissioner does not have a complaint-handling role, but may intervene in court cases involving children's rights. The Northern Territory and Queensland are the only states/territories whose Commissioners have the power to investigate complaints.³¹

B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the assistance of a representative

In general, civil proceedings are initiated not by a child but on behalf of a child by a next friend or a guardian *ad litem*; this person is generally the legal guardian of the child. The High Court Rules provide that a "person under disability", which includes children, must commence a proceeding by their litigation guardian.³² These rules are mirrored in the Federal Court and in state and territory Supreme Courts and

²⁷ Commonwealth Ombudsman, 'What we do', <http://www.ombudsman.gov.au/pages/about-us/our-office/what-we-do.php>, (accessed 28 January 2014); Australian Government Attorney-General's Department, 'Australian Administrative Law Policy Guide', <http://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/Australian%20Administrative%20Law%20Policy%20Guide.pdf>, 2011, (accessed 28 January 2014).

²⁸ Commonwealth Ombudsman, 'Frequently asked questions', <http://www.ombudsman.gov.au/pages/making-a-complaint/frequently-asked-questions/> (accessed 16 August 2015).

²⁹ For more information, see NSW Ombudsman, <http://ombo.nsw.gov.au/what-we-do/youth>, (accessed 28 January 2014); Victoria Ombudsman, <http://www.ombudsman.vic.gov.au/www/html/41-about-us.asp>, (accessed 28 January 2014).

³⁰ For more information, see Australian Human Rights Commission, 'The complaint process', <http://www.humanrights.gov.au/complaint-process-complaints-about-breaches>, (accessed 28 January 2014).

³¹ For more information, see Australian Institute of Family Studies, 'Children's commissioners and guardians', <http://www.aifs.gov.au/cfca/pubs/factsheets/a144880/index.html>, 2013, (accessed 28 January 2014).

³² High Court Rules 2004 (Cth), r. 21.08.1.

district courts. For example, in NSW, under the Uniform Civil Procedure Rules, a child as a “person under legal incapacity” may not commence or carry on proceedings except by his or her “tutor” (i.e. a next friend or guardian *ad litem*).³³

In civil proceedings the next friend or guardian *ad litem* acts in the place of the child and is responsible for the conduct of the proceedings. The next friend or guardian *ad litem* is not a party to proceedings and is not entitled to appear in person.

The Federal Circuit Court, where more children are involved in proceedings as compared to the Federal Court, requires a court-appointed litigation guardian for proceedings in the name of a child to be continued.³⁴

Common law recognises that the next friend or guardian *ad litem* should act in the best interests of the child.³⁵ Legislation does not place the same responsibility on the next friend or guardian *ad litem*, although the court rules of certain jurisdictions indicate that a person may not act as a next friend or guardian *ad litem* if they have an interest adverse to that of the child. For example, in NSW and Victoria, before commencing proceedings on behalf of a child, a certificate must be filed certifying that the litigation guardian or tutor has no interest in the proceedings adverse to the interests of the child.³⁶

In most administrative tribunals and complaints bodies, a child may initiate action in his or her own right without a next friend, tutor or guardian.³⁷ Children have long acted as applicants in a number of administrative tribunals including the Refugee Review Tribunal and the Social Security Appeal Tribunal, although concerns have been raised as to how child-friendly these processes are.³⁸

All states and the ACT and Northern Territory have Children’s Courts,³⁹ where certain cases relating to children are heard (for example, those involving care and protection of people under 18, and criminal cases in which the defendants were under 18 at the time of the alleged offence). In Victoria, the Children, Youth and Families Act provides that a child aged 10 years or more is capable of giving instructions to a lawyer independently of a parent or guardian in the majority of proceedings in the Family Division.⁴⁰ There has been commentary that this Act appears to provide a non-rebuttable statutory presumption that a child under 10 does not have the capacity to give instructions to a lawyer.⁴¹ In NSW, there is a rebuttable presumption that a child aged 10 or over is competent to give instructions to a lawyer but that a child aged under 10 is not. As in criminal proceedings all child defendants will be aged 10 or over, there is a presumption that all defendants are

³³ Uniform Civil Procedure Rules 2005 (NSW), r. 7.14(1).

³⁴ Federal Circuit Rules 2001 (Cth), Division 11.

³⁵ See, e.g. *Rhodes v Swithenbank* (1889) 22 QBD 577, 579; *In re Taylor's Application* (1972) QB 369.

³⁶ Supreme Court (General Civil Procedure) Rules 2005 (Vic), r. 15.03(6); Uniform Civil Procedure Rules, r. 7.16.

³⁷ Comments provided by the Shopfront Youth Legal Centre, Australia, August 2015

³⁸ Australian Law Reform Commission, ‘Seen and heard: priority for children in the legal process’, 1997, paras 2.144 - 2.149.

³⁹ Comments provided by the National Children’s and Youth Law Centre, Australia, August 2015.

⁴⁰ Children, Youth and Families Act 2005 (Vic), s. 525(1).

⁴¹ Magistrate Peter Power, ‘Family division - general’,

http://www.childrenscourt.vic.gov.au/sites/default/files/Research_Materials_4_FD_General_0.pdf, 2013, (accessed 28 January 2014), para. 4.7.

competent.⁴² Children may appear without a lawyer in the Children's Courts in NSW.⁴³

C. In the case of infants and young children, how would cases typically be brought?

The child's parent or legal guardian would typically initiate a lawsuit on behalf of the child as their next friend or guardian *ad litem* (known as a "tutor"⁴⁴ in NSW or a "litigation guardian" in Victoria) (see part II.B above).⁴⁵

As mentioned in part II.B, there is some scope for children to represent or give instructions themselves, particularly after attaining 10 years of age. However, it seems unlikely that the courts will permit a child younger than 10 to instruct a lawyer independent of assistance from a parent or guardian,⁴⁶ although the position in tribunals may be different.⁴⁷

D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

Legal aid is available in every state and territory, and is delivered primarily through state and territory legal aid commissions. These are independent statutory agencies established under state and territory legislation.

In NSW, legal aid is available to applicants subject to a means test to determine financial eligibility, and a merit test assessing the likelihood of success, benefit to the public, amongst other things.⁴⁸ In Victoria, legal aid is provided in circumstances where Victoria Legal Aid (VLA) is of the opinion that the applicant is unable to afford the full cost of obtaining legal services from a private lawyer.⁴⁹ In determining whether a person is in need of legal assistance, VLA will assess various factors, including the income, debts, liabilities, and assets of the person, as well as the cost of living in the locality.⁵⁰ VLA will also take into account the likelihood of success, and whether any benefit would accrue to the person or the wider public through the provision of legal aid.

In criminal matters, all children appearing before Children's Courts in NSW who are charged with a criminal offence are entitled to receive legal assistance and representation from the Children's Legal Service of Legal Aid NSW.⁵¹ In Victoria,

⁴² Comments provided by the Shopfront Youth Legal Centre, Australia, August 2015

⁴³ Children's Court, 'Representing yourself in court', http://www.childrenscourt.lawlink.nsw.gov.au/childrenscourt/legal_assistance/yourself_legal.html, 2012, (accessed 28 January 2014).

⁴⁴ Uniform Civil Procedure Rules, r. 7.14.

⁴⁵ For more information, see Office of the Public Advocate, 'Litigation guardian', http://www.publicadvocate.vic.gov.au/file/file/PracticeGuidelines/PG15_Litigation_Guardian_09.pdf, 2008, (accessed 28 January 2014).

⁴⁶ See *BE v. LH & MH*, Children's Court of Victoria, unreported, 04/06/2000, where LH (aged 6 years 5 months) and MH (5 years 2 months) were held to be not "mature enough to give instructions in these legal proceedings".

⁴⁷ Comments provided by the Shopfront Youth Legal Centre, Australia, August 2015

⁴⁸ Legal Aid Commission Act 1979 (NSW), Part 3.

⁴⁹ Legal Aid Act 1978 (Vic), s. 24.

⁵⁰ *Ibid.*, s. 24 (3).

⁵¹ For more information, see Legal Aid NSW, 'Children's legal service', <http://www.legalaid.nsw.gov.au/what-we-do/criminal-law/children-and-young-people>, (accessed 28 January 2014).

VLA provides assistance to children involved in criminal proceedings, particularly where offences are heard at the criminal division of the Children's Court, but also in cases that proceed to trial in the County and Supreme Courts.

Legal aid is potentially available to applicants in judicial review proceedings. In Victoria, VLA has considerable experience in providing assistance to vulnerable and disadvantaged clients seeking judicial review of administrative law decisions.⁵² Legal Aid NSW also has a history of providing assistance in seeking reviews of administrative decisions made by government or statutory authorities.⁵³

In all state jurisdictions, legal aid is less difficult to obtain for family or criminal law matters. Applications for civil law grants are less readily available.⁵⁴

- E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g. Would a child's parents or guardian have to agree to a case being brought)?

There are no other such conditions or limits. A child's parents or guardian(s) do not have to consent to the child or his/her litigation guardian initiating legal proceedings.

III. How can children's rights violations be challenged before national courts?

- A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

It is theoretically possible for children and/or their representatives to challenge violations of their rights by initiating civil legal proceedings at the state or territory level, in line with the relevant civil procedure rules for that particular state or territory.

Children's rights violations that constitute a criminal offence will usually be brought to the court by the prosecution, though private prosecutions are allowed in some instances (see part II.A above).

Judicial review proceedings to challenge decisions of public bodies can operate at the state or federal level. In federal matters, the usual options for judicial review are as follows: (i) seek review under the Administrative Decision (Judicial Review) ("ADJR") Act⁵⁵ if the child is a person aggrieved by an administrative decision or conduct which falls within the scope of the Act; (ii) seek the issue of a writ against an officer(s) of the Commonwealth in the Federal Court;⁵⁶ or (iii) seek the issue of a

⁵² VLA, 'Submission to Administrative Review Council on the judicial review in Australia consultation paper', <http://www.arc.ag.gov.au/Documents/Victorian%20Legal%20Aid%20-%20Submission%20ARC%20Judicial%20Review%20inquiry%20-%202011%20-%20Word.pdf>, 2011, (accessed 28 January 2014).

⁵³ Legal Aid NSW, 'Submission on reform on judicial review in NSW', <http://www.legalaid.nsw.gov.au/what-we-do/law-reform/civil/submission-on-reform-of-judicial-review-in-nsw,-april-2011>, 2011, (accessed 28 January 2014).

⁵⁴ For more information, see National Pro Bono Resource Centre, 'Legal aid', <http://www.nationalprobono.org.au/probonomanual/page.asp?sid=4&pid=9>, (accessed 28 January 2014).

⁵⁵ 1977 (Cth).

⁵⁶ Judiciary Act 1903 (Cth), s. 39B.

writ in the High Court.⁵⁷ Judicial review of government decisions gives courts limited powers to review decisions and can only find legal or “jurisdictional errors” in the decisions. Judicial review can also be brought under the statute in question if it so provides. The statute will usually set out which court has jurisdiction to hear the judicial review proceedings. Government decisions in states and territories can also be the subject of judicial review in the state/territory courts, which can also issue prerogative writs under the relevant ADJR Act or statutory schemes.⁵⁸

Aside from judicial review, people affected by decisions of public authorities can apply to certain tribunals for merits review, in which the tribunal can take a fresh look at the relevant facts and the relevant law and make up its own mind as to the exercise of any discretion. Certain decisions of the Federal Government or its agencies can be appealed to the Administrative Appeals Tribunal (AAT). The AAT provides independent merits review of administrative decisions made by Australian Government ministers, departments, agencies and some other tribunals. In limited circumstances, the AAT can review administrative decisions made by state government and non-government bodies.⁵⁹

Merits review is also available in administrative tribunals of various states and territories. For example, people affected by certain decisions of the Victorian Government or its agencies may appeal to the Administrative Division of the Victorian Civil and Administrative Tribunal (VCAT) for a review of the merits of the decision.⁶⁰ The NSW Civil and Administrative Tribunal (NCAT) can review the merits of decisions made by NSW Government bodies.⁶¹

Australia does not have a bill of rights, however, at the state level, legislative Charters of Human Rights have been adopted in Victoria⁶² and the ACT,⁶³ which cover a selective range of rights, predominantly taken from the International Covenant on Civil and Political Rights (ICCPR). The Charter of Human Rights and Responsibilities Act in Victoria imposes an obligation on all public authorities to act in a way that is compatible with human rights obligations, and to give proper consideration to relevant human rights when making a decision.⁶⁴ Where a person seeks review or relief from the decision of a public authority on the ground that the act or decision is unlawful, that person may seek relief or remedy on a ground of unlawfulness arising under the Charter.⁶⁵ Other states and territories have not adopted a charter of human rights, though government inquiries in Tasmania and Western Australia have recommended that a charter of human rights be enacted at a state level.⁶⁶

B. What powers would courts have to review these violations, and what remedies could

⁵⁷ Constitution, s. 75.

⁵⁸ Comments provided by the National Children’s and Youth Law Centre, Australia, August 2015.

⁵⁹ AAT, ‘What we do’, <http://www.aat.gov.au/about-the-aat/what-we-do>; Administrative Appeals Tribunal Act 1975, s. 25.

⁶⁰ Ibid.

⁶¹ NCAT, <http://www.ncat.nsw.gov.au/ncat/index.html>, (accessed 28 January 2014).

⁶² Charter of Human Rights and Responsibilities Act 2006 (Vic).

⁶³ Human Rights Act 2004 (ACT).

⁶⁴ Charter of Human Rights and Responsibilities Act, s. 38.

⁶⁵ Ibid., s. 39.

⁶⁶ Gilbert + Tobin Centre of Public Law, ‘Charters of human rights in Australia’, <http://www.gtcentre.unsw.edu.au/node/3070>, (accessed 28 January 2014).

they offer?

Civil courts can offer remedies in the form of injunctions or through awarding compensation.

Courts have the discretion to grant the following remedies in judicial review proceedings: order against a public body or official requiring it to perform a duty which it has failed to perform (mandamus); order to a public body or official requiring it to cease proceedings (prohibition); order quashing or setting aside the decision (certiorari); order preventing or requiring certain action (injunction); declaration of the legal position in relation to a particular issue (declaration); declaration that the decision is invalid or void; or referral of the matter back to the decision-maker for reconsideration and/or with court directions.⁶⁷

In merits review of administrative decisions, tribunals can affirm, vary or set aside the decision, and either substitute a new decision, or remit the decision, in which case it will send the matter back to the relevant department to be decided again in accordance with the tribunal's recommendations.⁶⁸

C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

Specific identification or involvement of individual child victims is not required for judicial review proceedings and public interest litigation brought by organisations or interest groups. Such representative bodies may be able to bring proceedings on behalf of child victims where they have an interest in the outcome of the case.⁶⁹

In class actions in the Federal Court, NSW and Victoria, as a general rule, the members of the claimant group need not be identified by name.⁷⁰

For civil lawsuits not relating to judicial review or public interest litigation, the identification of a specific victim is usually required.⁷¹ However, the courts can make an order to restrict the publication of certain information, such as the name of a party or witness, if it deems it necessary to prevent prejudice to the administration

⁶⁷ Administrative Decision (Judicial Review) Act, s. 16(1); for more information, see Law Handbook, 'Remedies in judicial review', <http://www.lawhandbook.org.au/handbook/ch21s02s03.php>, (accessed 28 January 2014); Mark Robinson SC, 'The legal framework of challenges to administrative decision making in NSW',

<http://www.robinson.com.au/monoartpapers/papers/MAR-Paper%20A%20NSW%20Administrative%20Law%20Refresher-Lord%20Howe%20April%202012.pdf>, 2012, (accessed 28 January 2014).

⁶⁸ See, e.g., AAT, 'AAT decisions', <http://www.aat.gov.au/StepsInAReview/IHaveMyDecision.htm>, 2013, (accessed 28 January 2014).

⁶⁹ For more information on standing in Australian judicial review cases, see Queensland Public Interest Law Clearing House (QPILCH), 'Standing in public interest cases', http://www.qpilch.org.au/_dbase_upl/Standing.pdf, 2005, (accessed 28 January 2014).

⁷⁰ Federal Court of Australia Act 1976 (Cth), s. 33H(2); Civil Procedure Act 2005 (NSW), s. 161; Supreme Court Act 1986 (Vic), s. 33H.

⁷¹ For a discussion of some of the privacy issues affecting identification of children in legal matters in Australia, see Australian Law Reform Commission, 'Particular Privacy Issues Affecting Children and Young People', <http://www.alrc.gov.au/publications/69.%20Particular%20Privacy%20Issues%20Affecting%20Children%20and%20Young%20People/identification-crimin>, 2008, (accessed 28 January 2014).

of justice.⁷² Hearings may also be conducted in private if the court is satisfied it is in the interests of justice to do so.⁷³

D. Is any form of collective action or group litigation possible, with or without naming individual victims?

Class actions (known as “representative proceedings” or “group proceeding” in the relevant legislation) are permitted in Australia, with most class actions being commenced under the Federal Court’s regime. NSW and Victoria also provide for class actions in legislative provisions that are in similar terms to the Federal Court’s regime.⁷⁴

To commence such proceedings, there must be seven or more persons who have a claim against the same person that arises out of the same, similar or related circumstances, and which gives rise to a substantial common issue of law or of fact’.⁷⁵ The claim is brought on behalf of all class members by one (or a small number of) representative plaintiff(s) – the representatives are the only class members to be parties to the proceedings. Every potential claimant who falls within the class definition is a member of the class unless they opt out of the proceedings.⁷⁶

E. Are non-governmental organisations permitted to file challenges to potential children’s rights violations or to intervene in cases that have already been filed?

Non-governmental organisations (NGOs) are permitted to bring judicial review proceedings in their own name where they have an interest in the outcome of the review. NGOs can also file for merits review of administrative decisions in the AAT if the decision relates to a matter included in the objects or purposes of the organisation.⁷⁷

In public interest litigation, NGOs can be granted standing after the court has considered a range of relevant factors, such as: the representative nature of the group (an important consideration is that the group granted standing is representative of a significant public concern); established interest in the area; relationship with the government; prior participation in the relevant process; whether there are other possible applicants (the absence of other possible applicants will favour the grant of standing); interest of members; and importance of issues.⁷⁸

Participation of NGOs in existing proceedings can be secured by applying to the court for leave to be joined as an intervener or being heard as an *amicus curiae* (or “friend of the court”). The role of *amicus curiae* is traditionally limited to assisting the court on points of law which may not otherwise have been brought to its attention, but in some public interest cases, the courts have allowed *amicus curiae* to put forward the views of a concerned organisation that may simply support the

⁷² Federal Court of Australia Act, s. 50.

⁷³ Administrative Appeals Tribunal Act, s. 35.

⁷⁴ Civil Procedure Act, Part 10; Supreme Court Act (Vic), Part 4A.

⁷⁵ Federal Court of Australia Act, s. 33C.

⁷⁶ Allens, ‘Class actions in Australia’, http://www.allens.com.au/pubs/pdf/ldr/papldraug13_01.pdf, 2013, (accessed 28 January 2014).

⁷⁷ Administrative Appeals Tribunal Act, s. 27(2).

⁷⁸ QPILCH, pp. 16-17.

arguments of one of the parties.⁷⁹

IV. Practical considerations

- A. Venue. In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

At state level, the Magistrates Court (or Local Court in NSW) deals with minor disputes such as civil matters involving amounts of less than \$100,000, and minor criminal cases. The next level is the District Court (or County Court in Victoria), which deals with more serious cases such as civil disputes up to \$750,000 and serious criminal offences such as rape. The highest state court, the Supreme Court, deals with appellate cases from the lower courts and with civil cases involving claims of more than \$750,000, as well as serious criminal cases involving loss of life.⁸⁰

Cases where a “child” (a defendant under 18 years of age for NSW,⁸¹ and in Victoria a defendant under the age of 17, 18 or 19, depending on the type of offence)⁸² is accused of committing any offence (other than homicide) may be dealt with by a Children’s Court.⁸³

Claims for judicial review of decisions made at state level should be challenged in the Supreme Court of the respective state,⁸⁴ while judicial review of federal matters should be challenged in the Federal Court or the Federal Circuit Court.⁸⁵

Applications for merits review of administrative decisions can be filed with the AAT in federal matters, VCAT in Victorian matters, and NCAT in NSW matters.

- B. Legal aid/Court costs. Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

Regarding legal aid, see part II.D above.

Regarding court costs and other expenses, NSW courts all charge various filing and administrative fees. To help with this, a waiver/postponement system is in place whereby all fees can be postponed for a legally assisted party until after judgment has been given.⁸⁶ Fees can also be waived on grounds of financial hardship.⁸⁷ Courts

⁷⁹ Administrative Review Council, ‘Judicial review in Australia’, http://www.arc.ag.gov.au/Currentprojects/Documents/Consultation_Review_in_Australia.pdf, 2011, (accessed 28 January 2014), p. 84.

⁸⁰ For more information, see NSW Courts & Tribunal Service, ‘Role of NSW courts and tribunals’, http://www.courts.lawlink.nsw.gov.au/cats/which_court_or_tribunal/jurisdiction.html, (accessed 28 January 2014).

⁸¹ Comments provided by the Shopfront Youth Legal Centre, Australia, August 2015.

⁸² Children, Youth and Families Act 2005 (Vic), s. 3(1).

⁸³ Children and Young Persons (Care and Protection) Act, Chapter 6; *Ibid.*, Chapter 7.

⁸⁴ See, e.g., Supreme Court Act 1970 (NSW).

⁸⁵ Administrative Decisions (Judicial Review) Act.

⁸⁶ See ‘Guidelines for the waiver, remission and postponement of fees’, http://www.localcourt.lawlink.nsw.gov.au/agdbasev7wr/_assets/localcourts/m40155115/feeguidelines.doc

in Victoria also offer options for postponement and/or waiver of court fees for legally assisted applicants, or where the payment of such fee would cause financial hardship.⁸⁸

- C. Pro bono/Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practising lawyers on a pro bono basis, through a children's rights organisation, or under an agreement that does not require the payment of legal fees up front?

A number of pro bono referral schemes are in operation at the state/territory level. Such schemes can refer matters to legal professionals who may be able to take on the cases for reduced rates or free of charge. Schemes generally have their own selection criteria, which may involve similar considerations to those for legal aid (see part II.D above). They will usually need to be satisfied that legal aid is not available.

Several community legal centres and other organisations focusing on children's rights also offer legal assistance, advice and/or representation to children. These include the National Children's and Youth Law Centre, Shopfront Youth Legal Centre (NSW), Youthlaw (Victoria), Youth Advocacy Centre (Queensland), Children's and Youth Legal Service (South Australia), Youth Legal Service Inc (Western Australia), Youth Law Centre (ACT), and the Public Interest Advocacy Centre (PIAC).

In addition, law clearinghouses also operate in Australia. These are able to refer matters to member organisations, such as law firms or barristers, who have indicated interest in representing pro bono clients. Examples include Justice Connect and QPILCH.

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

Indictable offences, such as cases of child sexual abuse, are not limited by time, as the state prosecutes. The court may, however, take into consideration a significant delay and can bar such cases being brought.⁸⁹

Regarding civil cases, limitation periods in relation to children can be quite complex.⁹⁰ In NSW, for personal injury claims from 1 September 1990 to 5

, (accessed 28 January 2014).

⁸⁷ Comments provided by the Shopfront Youth Legal Centre, Australia, August 2015.

⁸⁸ See Supreme Court Act (Vic), s. 129(3).

⁸⁹ For a full consideration of issues regarding limitation in historical child sex abuse cases, see Ben Matthews, 'Limitation periods and child sexual abuse cases: law, psychology, time and justice' (2006). For more information on limitation periods across the whole of Australia, see Anna Walsh et al., 'A state-by state-review' (2010), available at: http://www.mauriceblackburn.com.au/media/421792/2683869_1.pdf.

⁹⁰ For a comprehensive breakdown of the limitation periods, see LawCover, 'Schedule of limitation periods in civil matters in New South Wales', <http://www.lawcover.com.au/filelibrary/Files/Publications/sof/schedule-of-limitations.pdf>, 2013, (accessed 28 January 2014); Loddon Campaspe Community Legal Centre, 'Table of limitation dates applicable in Victoria', [http://www.communitylaw.org.au/cb_pages/images/Limitation%20Periods%20Victoria%20\(Updated%20](http://www.communitylaw.org.au/cb_pages/images/Limitation%20Periods%20Victoria%20(Updated%20)

December 2002, the limitation period for children bringing a claim is suspended until the child reaches 18 years,⁹¹ after which it is three years. For personal injury claims from 6 December 2002, the limitation period will be the first to expire of three years from the date when the cause of action is discoverable,⁹² or 12 years⁹³ from the time when the act or omission causing injury or death occurred; the limitation period is not suspended until the child reaches 18 if the child has a capable parent or guardian.⁹⁴ In the case that a child is injured by a parent, guardian, or close associate of a parent or guardian, a longer limitation period will apply.⁹⁵

Very similar provisions exist in Victoria. The limitation period for personal injury which occurred after 21 May 2003 is either a) 12 years from the date of the act or omission which allegedly resulted in the injury, or b) 3 years from the date on which the cause of action was discoverable;⁹⁶ for children, the limitation period is six years from the date of discoverability.⁹⁷ If the cause of action is against a parent, guardian, or close associate, then the discoverable date is deemed to be the 25th birthday of the victim, or the actual discoverable date if this is later.⁹⁸ For persons under a legal incapacity – which includes children not within the custody of a capable parent or guardian, the limitation period is suspended for the duration of the legal incapacity.⁹⁹ Various extensions may be granted in accordance with section 27K of the Limitation of Actions Act. For personal injuries occurring before 21 May 2003, for which proceedings had already been commenced prior to 1 October 2003, the limitation period will be 6 years.¹⁰⁰

In NSW and Victoria, guidelines have recently been adopted in respect of child sexual abuse proceedings, which include not enforcing limitation periods in civil claims against the state for child sexual abuse.¹⁰¹

Regarding judicial review, statutory schemes, states/territories and the Commonwealth have different time limits for applications. For example, judicial review proceedings must be brought within three months of the decision under

[March%202008\).pdf](#), 2008, (accessed 28 January 2014).

⁹¹ Limitation Act 1969 (NSW), ss. 11(3), 52(1)(d).

⁹² *Ibid.*, s. 50C(1)(a).

⁹³ *Ibid.*, ss. 50C(1)(b), 50 E(1)(a) (providing that the cause of action will be ‘discoverable’ by the victim when the victim turns 25 years of age or when the cause of action is actually discoverable by the victim, whichever is the later. The 12-year long stop limitation period runs for 12 years from the date when the victim turns 25 years of age. Accordingly, in cases of child abuse or child sexual assault by parents, guardians or their associates, a plaintiff may have until the age of 37 to commence proceedings.) For more information, see LawCover.

⁹⁴ *Ibid.*, ss. 50F(2)(a), 50A(2).

⁹⁵ *Ibid.*, ss. 50E(1)(a) and (b).

⁹⁶ Limitation of Actions Act 1958 (Vic), ss. 5(1AA), 27B, 27D, 27N.

⁹⁷ *Ibid.*, s. 27E.

⁹⁸ *Ibid.*, s. 271(2).

⁹⁹ Law Handbook, ‘Limitation of Actions Act’,

<http://www.lawhandbook.org.au/handbook/ch18s01s05.php>, (accessed 28 January 2014).

¹⁰⁰ Limitation of Actions Act, s. 5(1)(a).

¹⁰¹ See Victoria State Government, ‘Common Guiding Principles - child sexual abuse civil claims’, 2014, <http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/common+guiding+principles+-+child+sexual+abuse+civil+claims>; NSW Government, ‘NSW Government Guiding Principles for Government Agencies Responding to Civil Claims For Child Sexual Abuse’, 2014, <http://www.justice.nsw.gov.au/legal-services-coordination/Pages/info-for-govt-agencies/guiding-principle-s-civil-claims-child-sexual-abuse.aspx>.

review in NSW,¹⁰² and within a period of 60 days in Victoria.¹⁰³

- E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

In legal proceedings in a federal court (the High Court, Federal Court, Family Court or the Federal Circuit Court), the Commonwealth Evidence Act sets out the kinds of evidence that are admissible in civil proceedings. Evidence Acts in NSW and Victoria generally mirror the Commonwealth Evidence Act and its admissibility requirements.¹⁰⁴ Amongst other things, the Act allows for admission of documentary evidence, witness testimony, and identification evidence.

Children can appear as competent witnesses in state and federal courts. However, Victorian law holds that children under 14 are not competent to give sworn witness evidence unless a judicial determination has been made of the particular child's competency.¹⁰⁵ In NSW, the Evidence Act states that every person is presumed competent to give sworn evidence, unless he or she is "incapable of understanding that in giving evidence he or she is under an obligation to give truthful evidence".¹⁰⁶

In criminal proceedings, all states and territories have in place special provisions to protect child witnesses and make court proceedings less intimidating for them. For instance, in NSW, children who are or were aged 16 years or below at the time of the alleged offence are entitled to give evidence via CCTV, unless they choose not to do so. In cases involving child complainants of sexual offences in Victoria, the court must initiate special arrangements for the child, such as CCTV. In Queensland, Western Australia and Tasmania, child complainants must give evidence via CCTV or audiovisual link, unless the court deems them willing and able to give evidence in the courtroom.¹⁰⁷

Special provisions also exist in relation to cross-examination of child witnesses in criminal proceedings.¹⁰⁸ For example, in NSW, complainants in sexual offence matters cannot be cross-examined by the accused, but may be cross-examined by another person appointed by the court for that purpose. In Victoria, an accused person cannot personally cross-examine a protected witness in sexual and family violence cases.

Other provisions include using screens to block the accused from the complainant's view, pre-recorded evidence of child complainants, and having support persons and

¹⁰² Uniform Civil Procedure Rules (Amendment No 58) 2013 (NSW), r. 59.10(1).

¹⁰³ Supreme Court (General Civil Procedure) Rules, r. 56.02.

¹⁰⁴ For more information, see 'Evidence law in Australia',

<http://www.naa.gov.au/records-management/strategic-information/standards/records-in-evidence/evidence-law-australia.aspx>, (accessed 28 January 2014).

¹⁰⁵ Evidence Act 1958 (Vic), s. 23.

¹⁰⁶ Evidence Act 1995 (NSW), s. 13(1).

¹⁰⁷ For more information, see Australian Institute of Criminology, 'Child complainants and the court process in Australia',

<http://www.aic.gov.au/publications/current%20series/tandi/361-380/tandi380/view%20paper.html>, (accessed 28 January 2014).

¹⁰⁸ Ibid.

child intermediaries present when children give evidence.¹⁰⁹

- F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

The Federal Circuit Court, which deals extensively with matters relating to children, is extremely under-resourced. For example, migration judicial review proceedings listed in the Federal Circuit Court in Sydney are sometimes not heard for up to two years because of the backlog of matters and small number of judges. This means that by the time they appeal their matter, a child would have been the subject of migration merits and judicial review proceedings for up to three years.¹¹⁰

The 2011-12 Annual Report from the Supreme Court of Victoria states that the backlog of cases pending for more than 24 months decreased by 40% in comparison to the 2010-11 period, and those pending for more than 12 months decreased by 37%.¹¹¹ The 2010-11 Annual Review for the Supreme Court of NSW showed that for the Common Law Civil Division, 55% of pending cases were within 12 months of age, and 88% of cases were within 24 months of age. For the Common Law Criminal Division, 76% of pending cases were within 12 months of age, 98% were within 24 months. For the Court of Appeal, 88% were within 12 months, and 96% were within 24 months; and for the Court of Criminal Appeal, 92% were within 12 months, and 99% were within 24 months of age.¹¹²

- G. Appeal. What are the possibilities for appealing a decision to a higher court?

The first route of appeal will usually be at the state/territory level. In Victoria appeals go from the Magistrates' Court to the County Court to the Supreme Court.¹¹³ By contrast, in civil matters in NSW, the appeal is made directly from the Local Court to the Supreme Court.

If appeals through state/territory courts have been exhausted, appeal is possible at the national level to the High Court of Australia. In order to appeal to the High Court, the applicant must first file an application for special leave to appeal within 28 days after the judgment from which the appeal is brought.¹¹⁴ Applicants must persuade the High Court in a preliminary hearing that there are "special reasons" causing the appeal to be heard. Special leave is rarely granted unless a significant point of law is at issue. No further appeal is possible following a decision by the High Court, and the decision will bind all other courts throughout Australia.¹¹⁵

¹⁰⁹ Ibid.

¹¹⁰ Comments provided by the National Children's and Youth Law Centre, Australia, August 2015.

¹¹¹ Supreme Court of Victoria, 'Annual report 2011-2012' (2012), available at: https://assets.justice.vic.gov.au/scv/resources/cb734c31-5a31-4b6b-81bc-bb1c78cbc838/2011-12_scv_ar_web.pdf.

¹¹² Supreme Court of NSW, 'Annual review 2010 & 2011' (2011), available at: http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/2010.11_annual_review.pdf.

¹¹³ For details on the appeals procedure to the Supreme Court of Victoria, see Supreme Court of Victoria, 'Court of Appeal registry', <http://www.supremecourt.vic.gov.au/home/practice+and+procedure/court+of+appeal+registry/>, (accessed 28 January 2014).

¹¹⁴ High Court Rules, r. 41.02.1.

¹¹⁵ High Court of Australia, 'Operation of the High Court', <http://www.hcourt.gov.au/about/operation>,

Criminal appeals will pass through different appellate courts, although the structure will generally be the same as the civil process. The state Supreme Courts operate courts of criminal appeal, and, as with civil complaints, the final court of criminal appeal is the High Court.

Appeals from the AAT regarding a review of an administrative decision must be made to the Federal Court no later than 28 days after receiving the AAT's decision.¹¹⁶

- H. Impact. What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

As a common law jurisdiction, judicial precedent lies at the heart of Australia's legal system. As a result, decisions from the appellate courts, particularly from the Supreme Courts of each state/territory and the High Court, can have a profound and long-term impact on the interpretation of the law.¹¹⁷ 'Bad decisions' from the higher courts can be far-reaching and can lead to popular and/or political backlash.

The Australian Government has generally shown willingness to abide by decisions and to take measures to ensure they are implemented.¹¹⁸ Federal and State governments have, however, also often enacted legislation to overcome the impact of an unwelcome court decision. This is a risk associated with test case litigation.¹¹⁹

Finally, those who bring challenges must factor in the risk of any adverse costs order.

- I. Follow up. What other concerns or challenges might be anticipated in enforcing a positive decision?

Enforcement of state/territory-level judgments is governed by the respective civil procedure rules for each jurisdiction. Enforcement of judgments of the High Court is governed by the High Court Rules.

Since the AAT is not technically a court, it does not have enforcement powers, but departments of state are bound to implement the decisions of the Tribunal through the Administrative Appeals Tribunal Act. Such implementation will often require the passing of an act of government.

V. Additional factors. Please list any other national laws, policies or practices you

(accessed 28 January 2014).

¹¹⁶ For detailed information on this appeals process, see Federal Court of Australia, <http://www.fedcourt.gov.au>, (accessed 28 January 2014).

¹¹⁷ For a discussion of precedent in Australian law, see Justice Michael Kirby, 'Precedent – Report on Australia' (2006), International Academy of Comparative Law Conference, available at: http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_17jul06.pdf.

¹¹⁸ See, e.g., the reaction to the decision in *Commonwealth v Tasmania* (1983) 158 CLR 1, and *Al-Kateb v Godwin & Ores* [2004] HCA 37. For a more recent example, see the Environment Minister's comments in this report on a recent ruling: 'Supreme Court chief justice rules against controversial Kimberley gas hub approvals', <http://www.abc.net.au/news/2013-08-19/supreme-court-delivers-decision-over-gas-hub-approvals/4896184>, 2013, (accessed 28 January 2014).

¹¹⁹ Comments provided by the Shopfront Youth Legal Centre, Australia, August 2015.

believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

Important additional consideration should be given to the provisions in place regarding children's rights within Australia's indigenous communities, the Aboriginal and Torres Strait Islander people. The legal systems and practices of such indigenous peoples are referred to as customary law, and attempts have been made to recognise these officially within the codified Australian law. This has been particularly the case in the Northern Territory, which has a substantial indigenous population, and where the Community Welfare Act has been amended to incorporate some aspects of customary law.¹²⁰

Controversy has surrounded this, as opponents argue that customary law can infringe upon human rights (as conceived in international law – as noted earlier Australia does not have a codified bill of rights). Problems have arisen in certain court cases.¹²¹

Despite some controversy, significant provision has been made to accommodate and allow greater participation by the indigenous communities in court processes across Australia. Victoria, for instance, has established a Koori Court,¹²² which operates as a division of the Magistrates Court; within this there is also a Children's Koori Court,¹²³ which deals with children from indigenous families who have been accused of criminal offences.¹²⁴

Provisions have been made nationally to provide a culturally appropriate service to children from indigenous families who are involved in legal proceedings. The Family Law Act 1975, for instance, recognises the need for children to remain connected with their indigenous culture following separations within the family.¹²⁵ Indigenous advisors and interpreters may also be appointed.

The Australian Law Reform Commission has made submissions that incorporation of customary law into the wider Australian legal system should continue to ensure compliance with the rights of children as set out in the Universal Declaration on Human Rights and elaborated in subsequent instruments such as the ICCPR and the International Covenant on Economic, Social and Cultural Rights.¹²⁶

The 2012 Concluding Observations of the Committee on the Rights of the Child on Australia made specific reference to the rights of Aboriginal and Torres Strait

¹²⁰ Sentencing Amendment (Aboriginal Customary Law) Act 2004 (NT).

¹²¹ See the transcript of a news report on a case in which the High Court rejected a customary law defence in a sexual abuse case: 'High Court rejects customary law defence in sexual abuse case', <http://www.abc.net.au/worldtoday/content/2006/s1642802.htm>, 2006, (accessed 28 January 2014).

¹²² Magistrates Court Act 1989 (Vic).

¹²³ Children, Youth and Families Act.

¹²⁴ For more information, see Magistrates' Court of Victoria, 'Koori Court', <http://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/koori-court>, (accessed 28 January 2014).

¹²⁵ Family Law Act 1975 (Cth), s. 60CC.

¹²⁶ For information on the recognition of Aboriginal customary law in Australia and potential conflicts with human rights provisions, see Australian Human Rights Commission, 'Expert seminar on Indigenous Peoples', <http://www.humanrights.gov.au/expert-seminar-indigenous-peoples-issue-3-recognising-aboriginal-customary-law-and-developments>, 2003, (accessed 28 January 2014).

Islander children, and expressed concerns that these children continued to face “serious and widespread discrimination” including lack of access to basic services, and significant overrepresentation in the criminal justice system.¹²⁷ The Committee has recommended that the Australian Government take urgent measures to address disparities in access to services by these children and their families.

Furthermore, the Committee expressed its deep concerns over Australia’s treatment of asylum-seeking and refugee children. In particular, the Committee highlighted the mandatory detention of such children without time limits and judicial review, and the policy of “offshore processing” of asylum and refugee claims which undermines their access to effective procedures for assessing their need for protection.¹²⁸ The Committee urged Australia to ensure that if immigration detention is imposed, it is subject to time limits and judicial review, as well as ensure adequate legal protections for such children and abandon its policy of “offshore processing”.¹²⁹

Formidable barriers prevent or limit children's participation in legal processes. One of these barriers relates to children's developmental capacity and is not entirely amenable to improvement. Other barriers are created by the assumptions of an adult legal system about the legal capacities of children to participate and by the processes themselves that were designed by and for adults. The Australian Law Reform Commission has in its report (‘Seen and Heard: Priority for Children in the Legal Process’) attempted to address these barriers through recommendations that set out what children need to know to deal with the legal process (developmental capacity), how children should be engaged appropriately within the legal process (legal capacity) and how to ensure that the legal process itself does not add to the problem (the adult system).¹³⁰ The bulk of this report’s recommendations have not been implemented in the 18 years since the report was published.¹³¹

This report is provided for educational and informational purposes only and should not be construed as legal advice.

¹²⁷ UN Committee on the Rights of the Child, *Concluding observations on the fourth periodic report of Australia*, para. 29(a).

¹²⁸ *Ibid.*, para. 80.

¹²⁹ *Ibid.*, para. 81.

¹³⁰ Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* (1997) chapter 4

¹³¹ Listen to Children Report 2011 and the Australian Child Rights Taskforce submission to the Productivity Commission Inquiry into Access to Justice Arrangements June 2014